

ESTTA Tracking number: **ESTTA701041**

Filing date: **10/08/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

## Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

### Opposer Information

Name	AFAB Industrial Services, Inc.		
Entity	Corporation	Citizenship	Pennsylvania
Address	350 Camer Drive Bensalem, PA 19020 UNITED STATES		

Attorney information	Sean P. McConnell PEPPER HAMILTON LLP 3000 Two Logan Square Eighteenth and Arch Streets Philadelphia, PA 19103-2799 UNITED STATES mcconnells@pepperlaw.com, tilleryk@pepperlaw.com, catalant@pepperlaw.com Phone:215-981-4252
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### Applicant Information

Application No	86599421	Publication date	09/15/2015
Opposition Filing Date	10/08/2015	Opposition Period Ends	10/15/2015
Applicant	Pac-West Distributing NV LLC 848 N. Rainbow Blvd #5307 Las Vegas, NV 89107 UNITED STATES		

### Goods/Services Affected by Opposition

Class 003. First Use: 2012/06/00 First Use In Commerce: 2012/06/00 All goods and services in the class are opposed, namely: All-purpose cleaners; Cleaning preparations
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### Grounds for Opposition

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Other	No lawful use in commerce

Attachments	10-08-2015 Notice of Opposition (SUPER RUSH, Ser. No. 86599421).pdf(205782 bytes )
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## Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Sean P. McConnell/
Name	Sean P. McConnell
Date	10/08/2015

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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AFAB INDUSTRIAL SERVICES, INC.

Opposer,

v.

PAC-WEST DISTRIBUTING NV LLC,

Applicant.

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Opposition No.

Mark: SUPER RUSH

Application Ser. No.: 86/599421

Published in *Official Gazette*: Sept. 15, 2015

Filed: April 16, 2015

**NOTICE OF OPPOSITION**

United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Dear Sir/Madam:

Opposer AFAB Industrial Services, Inc. (“AFAB” or “Opposer”) believes it will be damaged by the issuance of a trademark registration to Pac-West Distributing NV LLC (“PWD” or “Applicant”) for the mark SUPER RUSH (Serial No. 86/599421) in International Class 3 (the “Opposed Application”), and hereby opposes the application. As grounds for the opposition, AFAB alleges as follows:

1. Opposer, AFAB, is a Pennsylvania Corporation, with a principal place of business at 350 Camer Drive, Bensalem, Pennsylvania 19020.
2. AFAB is a manufacturer and producer of a variety of consumer products.
3. Upon information and belief, PWD is a Nevada limited liability company with a principal place of business at 848 N. Rainbow Boulevard, #5307, Las Vegas, Nevada 89107.

4. PWD is seeking to obtain, under the provisions of the Trademark Act of 1946, as amended, registration on the Principal Register of the mark SUPER RUSH for “all-purpose cleaners; cleaning preparations” in International Class 3 (“PWD’s Mark”).

5. PWD filed the Opposed Application pursuant to 15 U.S.C. § 1051(a), claiming PWD’s Mark was in use in commerce and including the specimen below to demonstrate use:



6. PWD has threatened legal action against AFAB, alleging that AFAB is infringing or has infringed PWD’s Mark.

7. Upon information and belief, PWD’s use of PWD’s Mark does not constitute lawful use of a trademark in commerce.

8. The Federal government has banned Isobutyl Nitrites and Alkyl Nitrites, stating it is unlawful for these chemicals/compounds to be used in connection with consumer products that may be used for inhaling or otherwise introducing the chemicals into the human body. *See* 15 U.S.C. §§ 2057(a) and (b).

9. Upon information and belief, PWD uses and has used PWD's Mark to market and sell consumer products that contain banned hazardous chemical solvents, including Isobutyl Nitrites and/or Alkyl Nitrites.

10. Upon information and belief, the consumer products sold under PWD's Mark contain illegal and hazardous chemical compounds or solvents, including Isobutyl Nitrite and/or Alkyl Nitrite, which are designed to or may be introduced into the human body, by way of inhaling.

11. The following pictures of PWD's SUPER RUSH branded product and product packaging show use of PWD's Mark in connection with consumer products specifically containing Alkyl Nitrite or Isobutyl Nitrite.







12. As demonstrated by PWD's product labeling and packaging shown in the photographs above ("PWD's Labeling"), the products sold under PWD's Mark are consumer products, and not commercial products.



13. As demonstrated by PWD's Labeling, products sold under PWD's Mark are sold in small, consumer-sized volumes, namely, in either 1.0 fluid ounce or .34 fluid ounce bottles.

14. Upon information and belief, products of such volume are not typical for commercial sales and are more typically the type sold to general consumers.

15. Upon information and belief, PWD's products sold under PWD's Mark are marketed and sold through general consumer retail sales.

16. Where PWD's Labeling describes the product as a "Multi-purpose solvent cleaner," it includes simple instructions for consumers, namely, "Dip cotton swab in solvent and apply to area to be cleaned."

17. PWD's Labeling also identifies PWD's Mark as being used in connection with "liquid incense."

18. According to the on-line Merriam-Webster dictionary, "incense" is defined as "a substance that is used often in religious ceremonies to produce a strong and pleasant smell"; or "material used to produce a fragrant odor when burned" or "broadly: a pleasing scent." See <http://www.merriam-webster.com/dictionary/incense>.

19. Where PWD's Labeling describes the product as an "incense," it includes simple instructions for consumers to "Remove cap, allow to stand, aroma will develop."



**COUNT I – NO LAWFUL USE IN COMMERCE**

20. AFAB incorporates by reference paragraphs 1 – 19 as if set forth fully herein.

21. To qualify for federal trademark registration, the use of a mark in commerce must be lawful.

22. Products containing Isobutyl Nitrites and/or Alkyl Nitrites that are used for consumer products that may be inhaled or otherwise introduced to the human body have been banned, and are unlawful, pursuant to Federal Law.

23. The marketing and sale of products containing Isobutyl Nitrites and/or Alkyl Nitrites that are used for consumer products that may be inhaled or otherwise introduced to the human body that have been banned, does not qualify as lawful use in commerce.

24. Upon information and belief, PWD uses PWD's Mark to market and sell products that contain banned chemical solvents, namely Alkyl Nitrite and/or Isobutyl Nitrite, which products are designed to or may be inhaled or otherwise introduced to the human body.

25. Upon information and belief, PWD's use of PWD's Mark in commerce is not lawful and is incapable of supporting a federal trademark registration.

26. PWD's Mark does not qualify for federal trademark registration as it does not fulfill the requirements of the Trademark Act, including Sections 1 and 45, 15 U.S.C. §§ 1051, 1127.

27. AFAB will be damaged by the registration of PWD's Mark because such registration would mislead the public as to the propriety and legality of PWD's Mark, and the Registration would assist and enable PWD to bring enforcement proceedings against AFAB for AFAB's use of any similar mark for an otherwise legal product.

## **COUNT II - FRAUD**

28. AFAB incorporates by reference paragraphs 1 – 27 as if set forth fully herein.

29. During the course of prosecuting the Opposed Application, PWD affirmatively misrepresented to the Trademark Office and the Examining Attorney that it was using PWD's Mark in connection with the goods listed in the application, and that PWD's use of PWD's Mark was, in fact, lawful.

30. PWD knowingly made the aforesaid misrepresentation to the Examining Attorney and the Trademark Office.

31. PWD made the aforesaid misrepresentations to the Examining Attorney and the Trademark Office with the intention that the aforesaid misrepresentation would be relied upon to support the issuance of a trademark registration to PWD.

32. The Examining Attorney and the Trademark Office did, in fact, rely upon PWD's misrepresentations by approving for publication and publishing the Opposed Application in the *Official Gazette*.

33. The acts of PWD constitute fraud in the prosecution of the Opposed Application.

34. AFAB will be damaged by the registration of PWD's Mark because such registration would mislead the public as to the propriety and legality of PWD's Mark, and the Registration would assist and enable PWD to bring enforcement proceedings against AFAB for AFAB's use of any similar mark for an otherwise legal product.

WHEREFORE, it is respectfully requested that this opposition proceeding be sustained and registration be denied to Applicant.

Respectfully submitted,

Date: October 8, 2015

/Sean P. McConnell/

M. Kelly Tillery

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*Attorneys for Opposer,*

*AFAB Industrial Services, Inc.*

**CERTIFICATE OF SERVICE**

I, Sean P. McConnell, hereby certify that on October 8, 2015, a true and correct copy of the foregoing Notice of Opposition has been served via Email and U.S. First Class Mail, postage prepaid, to:

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*Attorneys for Applicant,  
Pac-West Distributing NV LLC*

/Sean P. McConnell/  
Sean P. McConnell

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